Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-2012

No. .....

In the Supreme Court

OF THE

United States

October Term, 1985

DR. CHARLES MILO CONNICK,
Petitioner,

VS.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA and
COLLEGE RETIREMENT EQUITIES FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. THOMAS GILBRIDE
7624 S. Painter Avenue
Second Floor
Whittier, CA 90602
(213) 698-9561
Attorney for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

QUESTIONS PRESENTED

1. Whether a participant under an ERISA regulated pension plan has standing to bring suit against said plan for breach of its fiduciary duties to said participant pursuant to 29 USCA 1104(a)(1).

2. Whether a participant under an ERISA regulated pension plan has standing to bring suit against said plan for its failure to:

   a. Discharge its duties with respect to the plan solely in the interests of the plan participants and beneficiaries;

   b. Send to the participants full, honest and accurate reports of the participant's investment on an annual basis;

   c. Obtain the best management and investment expertise available to the plan;

   d. Make the best investments to bring the highest return on the participant's contributions;

   e. Maintain current their investment practices and procedures to best serve the participant and beneficiary

3. Whether or not the decision by the Ninth Circuit Court is in conflict with this court's decision in *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. ____, 87 L. Ed. 2d 96, 105 S. Ct. ____ (1985).

LIST OF PARTIES

All parties interested in this matter are listed in the caption herein.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Table of Authorities	ii
Opinion Below	1
Jurisdiction of This Court	2
Statutes Involved With This Case	2
Statement of the Case	2
Reasons for Granting the Writ	3
I	
The Decision Below Disregarded And Is In Conflict With All Relevant Prior Judicial Interpretation As To Who Bears The Burden Of Proof In A Summary Judgment Motion	3
A. The Law	3
B. Breach of Fiduciary Duty	3
C. There are Genuine Issues As To Material Facts As To Each Count	8
II	
The Court Of Appeals Disregarded The Recent Holding In This Court In *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. ____, 87 L. Ed. 2d 96, 105 S. Ct. ____ (1985) By Denying Plaintiff Standing To Sue Defendants For Their Breach Of ERISA Fiduciary Duties	9
Conclusion	11

INDEX TO APPENDIX

A. Opinion.

B. Order granting Motion to Dismiss and Motion Summary Judgment; Statement of Uncontroverted Facts and Conclusions of Law.

C. Relevant Statutes.

D. First Amended Complaint.

TABLE OF AUTHORITIES CITED

Cases

	Page
Adickes v. S.H. Kress and Co. (1970) 398 U.S. 144, 26 L.Ed.2d 142	3
American Con. Ass'n etc. v. Retirement Plan, etc., 488 F.Supp. 479 (S.D.N.Y.), Aff'd, 646 F.2d 559 (2d Cir. 1980)	4, 5, 6
Chavez v. Smith (CA Ninth 1974) 497 F.2d 1043	3
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.2d. 80 (1957)	5
Cox v. American Fidelty and Gas co. (CA Ninth 1957) 249 F.2d 616	3
Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. ____, 87 L.Ed.2d 96, 105 S.Ct. ____ (1985)	i, 9
Pepper and Tanner, Inc. v. Shamrock Broadcasting, Inc. (CA Ninth 1977) 563 F.2d 391	3

Rule

Federal Rules of Civil Procedure, Rule 56	3

Statutes

Employee Retirement Income Security Act of 1974 (ERISA) Sec. 502(a) (29 USC § 1132(a))	10
United States Code, Title 28, Sec. 1254(1)	2
United States Code Annotated, Title 29, Sec. 1001(b)	11
United States code Annotated, Title 29, Sec. 1104	4
United States Code Annotated, Title 29, Sec. 1104(a)(1)	i, 4

No. .....

In the Supreme Court

OF THE

United States

October Term, 1986

DR. CHARLES MILO CONNICK,
Petitioner,

VS.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA and
COLLEGE RETIREMENT EQUITIES FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Dr. Charles Milo Connick prays that a Writ of Certiorari issue to review a final order of the United States Court of Appeals Ninth Circuit affirming the District Court's order granting Appellees Motion for Summary Judgment and Motion to Dismiss.

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra* A1-A10) is not yet reported.

There was no formal opinion of the District Court. The Court's order granting the motion to dismiss and motion

for Summary Judgment; Summary Judgment and Statement of Uncontroverted Facts and Conclusions of Law are set forth in Appendix B.

JURISDICTION OF THIS COURT

The judgment of the Ninth Circuit Court of Appeals was entered on March 14, 1986. The jurisdiction of this court is invoked under 28 USC 1254(1).

STATUTES INVOLVED WITH THIS CASE

The statutes relevant to this case are set forth in Appendix C pages 1-22.

STATEMENT OF THE CASE

This is an action brought by Dr. Charles Milo Connick, a retired Whittier College professor against Defendants Teachers Insurance and Annuity Association of America (TIAA) and College Retirement Equities Fund (CREF) for 7 counts ranging from breach of contract to breach of fiduciary duties. The counts arise out of the alleged mismanagement and breach of fiduciary duties by Defendants of the retirement contributions made by Plaintiff and Whittier College to Defendants from 1949 to present. The contributions exceed $203,000.00.

The U.S. District Court for the Central District of California granted Defendant's motion to Dismiss and Summary Judgment.

The Court of Appeals for the Ninth Circuit affirmed that judgment but failed to address the ERISA violations except to state that appellant "... has failed to allege specific facts to show that there is a genuine issue for trial" (p. 10 of opinion App. A).

REASONS FOR GRANTING WRIT

I.

The decision below disregarded and is in conflict with all relevant prior judicial interpretation as to who bears the burden of proof in a Summary Judgment Motion.

A. The Law

Summary judgment is not a substitute for a trial of disputed fact issues. *Chavez v. Smith* (C A Ninth 1974) 497 F.2d 1043.

Accordingly, the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried.

Pepper and Tanner, Inc. v. Shamrock Broadcasting, Inc. (C A Ninth 1977) 563 F.2d 391.

Rule 56 motions are to be denied whenever there is "the slightest doubt" as to the facts. *Cox v. American Fidelity and Gas Co.* (C A Ninth 1957) 249 F.2d 616.

The burden of proof is thus on the movant; the evidence presented to the court is always construed in favor of the party opposing the motion and he is given the benefit of any favorable inferences that can be drawn from it. *Adickes v. S.H. Kress and Co.* (1970) 398 U.S. 144, 26 L.Ed. 2d 142.

B. Breach of Fiduciary Duty

Plaintiff alleges a Count for Breach of Fiduciary Duties imposed by ERISA on Defendants in his First Amended Complaint (Appendix D pages 1-18).

Defendants admit that their plans are ERISA regulated and by reason therefore Defendants owe the Fiduci-

ary duties to Plaintiff as set forth in 29 USCA § 1104. (Clerk's Transcript 17, p. 39 lines 1-12; Clerk's Transcript 25 paragraph 5).

Defendants contend that Plaintiff has merely made "bold conclusory allegations" and pursuant to *American Con. Ass'n etc. v. Retirement Plan, etc.*, 488 F. Supp. 479 (S.D.N.Y.), Aff'd, 646 F.2d 559 (2d Cir. 1980) such allegations are inadequate. (Clerk's Transcript 17, pp. 42 & 43).

> (1) The duties set forth in Paragraph 49f through 49i of the First Amended Complaint are appropriate duties pursuant to 29 USC 1104.

29 USCA § 1104(a)(1) provides that a plan Fiduciary must discharge his duties with respect to a plan solely in the interests of the plan participants and beneficiaries.

In discharging his duties, the Fiduciary must act "for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan". He must conduct the affairs of the plan "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims".

Moreover, he is required to diversify "the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so."

The Fiduciary must also act "in accordance with the documents and instruments governing the plan to the extent that those documents and instruments are consistent with the requirements of the law."

The duties set forth by Plaintiff in Paragraph 49f-49i are implicit in the above specific duties.

How can a fiduciary discharge its duties with respect to the plan solely in the interests of the plan participant and beneficiaries without sending full, honest and accurate reports to the participants and beneficiaries, or obtaining the best management and investment expertise available to the fiduciary or making the best investments on behalf of the plan participants or maintaining current their investment practices and procedures to best serve the plan participants?

It is important to note at this point that Plaintiff has not alleged that a refusal to pay a lump sum distribution is an ERISA violation (it was alleged as a contractual violation).

(2) The allegations set forth by Plaintiff are legally sufficient to withstand a Motion to Dismiss.

Defendants have cited *American Con. Ass'n, etc., supra* in their motion to stand for the proposition that Plaintiff's allegations are mere conclusory and inadequate as a matter of law. (Clerk's Transcript 17).

The classic statement referred to as notice pleading policy is provided by the Supreme Court in *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957):

"The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pre-trial procedures established by the Rules."

It is the position of Plaintiff that he has sufficiently pleaded the count to withstand a motion to dismiss.

The Plaintiffs in *American Con. Ass'n, etc., supra* in an amended complaint made one conclusory allegation regarding the violation of Defendants' Fiduciary obligation under ERISA.

The Court stated at page 483

> "the Complaint contains no factual specification of any act the trustees took or failed to take that resulted in the lower rate of return alleged by Plaintiffs."

The Court goes on to say that Plaintiffs have not alleged a single act of commission or omission to indicate the trustees were derelict in the discharge of their fiduciary duties.

In the present case at Paragraph 50 of the First Amended Complaint Plaintiff has alleged the specific conduct of Defendants; for this reason a Motion to Dismiss would be inappropriate.

(3) Plaintiff Set Forth Sufficient Facts In His Opposition To A Motion For Summary Judgment To Allow a Trial On The Merits.

Defendants in their motion, Declarations and Reply Memorandum *failed to present facts or argument denying the charges of Plaintiff in Paragraphs 49 and 50 of the First Amended Complaint.*

Plaintiff, through its Declaration has shown that there is a factual issue as to the breaches of Fiduciary Duties by Defendants.

For example:

Plaintiff has made the following charges against Defendants which Defendants *have failed to address.*

(a) Defendants have failed to discharge its duties with respect to the plan solely in the interests of the plan participants and beneficiaries.

The Declarations of Plaintiff show Defendants have not adequately explored or adequately responded to the policy innovations and the competitive new programs available today. (Clerk's Transcript 19 Paragraph 12).

(b) Defendants have failed to send to Plaintiff full, honest and accurate reports of Plaintiff's investment to him on an annual basis.

Defendants have ignored performance results in previous years and have changed its reporting procedures various times to make it appear the plans were doing better than they were. (Clerk's Transcript 19 Paragraph 13).

(c) Defendants have failed to obtain the best management and investment expertise available to Defendants.

CREF has only internal management with unique unaccountability. CREF does not use any outside managers or Professional Investment Management firms. Because outside managers tend to have more incentive to perform than inside employees, the track record for the inside managers is very weak. (Clerk's Transcript 19 Paragraph 14).

(d) Defendants have failed to make the best investments to bring the highest return on Plaintiff's contributions.

TIAA's Annuity Income obtained only a 2.7% average yearly increase from 1973 to 1982.

CREF's Annuity Income actually decreased in value from 1973 to 1982 (1973 — 1,518 to 1982 — 11,469).

None of these figures take into consideration adjustments for inflation. (Clerk's Transcript 19 Paragraph 14).

(e) Defendants have failed to maintain current their investment practices and procedures to best serve the Plaintiff.

Defendants have failed to innovate since the introduction of CREF in 1952.

Since 1952 most other pension plans have added various equity funds, Keogh plans, IRA, money market funds, intermediate bond funds, municipal bond funds, taxable bond fund, variable annuities, single purpose fund portfolios (e.g., energy technology, precious metals, health, utilities, etc.) and many others. All this time Defendants have only added in 1974 a supplement retirement annuity with "front end load charges" which it reduced in 1982. (Clerk's Transcript 19 Paragraph 12).

C. There Are Genuine Issues As To Material Facts As To Each Count.

The Appellate Court failed to follow its own standard as to burden of proof in that Plaintiff presented *uncontroverted* evidence but was not allowed a trial on the merits.

II.

The Court of Appeals disregarded the recent holding in this court in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. ____, 87 L. Ed. 2d 96, 105 S.Ct. ____ (1985) by denying Plaintiff standing to sue Defendants for their Breach of ERISA Fiduciary Duties.

In that case a woman who was a beneficiary under two employee benefit plans administered by her employer and governed by ERISA brought suit against the employer in the California Superior Court based on an interruption in benefits from October 17, 1979 when her benefits were terminated, to March 11, 1980, when her eligibility was restored. Although the woman ultimately received all the benefits to which she was contractually entitled, she alleged a breach of fiduciary duty based on the allegedly improper refusal to any benefits during the period in question and sought to hold the employer, as fiduciary personally liable for extracontractual compensatory and punitive damages.

The case was removed to the United States District Court for the Central District of California which held that ERISA barred any claims for extracontractual damages.

The United States Court of Appeals for the Ninth Circuit reversed as to the ERISA claim holding that the fiduciary had violated its obligation to process claims in good faith and in a fair and diligent manner.

On certiorari the United States Supreme Court held that a plan participant does not have a Cause of Action against a fiduciary for extracontractual compensatory or punitive damages caused by the improper or untimely processing of benefit claims.

The concurring opinion written by Justice Brennan and joined by Justices White, Marshall and Blackmun very carefully point out that the decision should be narrowly construed.

At page 107 the opinion notes that Section: 502(a) of The Employee Retirement Income Security Act of 1974 (ERISA) 29 USC Section: 1132(a) provides a wide array of measures to plan participants and beneficiaries by which they may enforce their rights under ERISA and under the terms of plans.

On pages 108 and 109 the Court stated:

> "This does not resolve, of course whether and to what extent extracontractual damages are available under Section: 502(a)(3). This question was not addressed by the courts below and was not briefed by the parties and amici. Thus the court properly emphasizes that 'we have no occasion to consider whether any other provision of ERISA authorizes recovery of extra-contractual damages' "

The court further states on page 110:

> " . . . Section: 502(a)(3) authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' 'any act or practice which violates *any* provision of' this subchapter or the terms of the 'plan'. This section and Section: 404(a)'s fiduciary duty standards both appear in Chapter 18, subchapter I, which is entitled:
>
> > 'Protection of Employees Benefit Rights' a beneficiary therefore may obtain 'appropriate equitable relief' whenever an administrator breaches the fiduciary duties set forth in Section: 404(a) . . . "

The Present case before this court is brought under Section 502(a)(3) and the equitable relief sought herein is appropriate and consistent with the *Mass. Mutual Life Insurance Company* case.

CONCLUSION

Congress declared that as a policy the ERISA statutes are to protect the interests of participants in employee benefit plans and their beneficiaries . . . "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts" (29 USCA 1001(b))

Dr. Connick has been denied that access.

The instant case raises a question of general importance in the administration of retirement plans and the ability of the participants and beneficiaries to obtain appropriate remedies and sanctions should it be necessary.

For the reasons stated above, the Writ of Certiorari should be granted.

Respectfully submitted,
J. THOMAS GILBRIDE
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR. CHARLES MILO CONNICK,
Plaintiff-Appellant,

vs.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA & COLLEGE RETIREMENT EQUITIES FUND,
Defendants-Appellees.

CA No. 84-6556
DC No. CV 84-834-MR

OPINION

Appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, Presiding
Argued and submitted February 4, 1986 at Pasadena, California

---

Before: ANDERSON and PREGERSON, Circuit Judges, and SOLOMON,* District Judge.

Filed: March 14, 1986 Cathy A. Catterson, Clerk
SOLOMON, Judge: U.S. Court of Appeals

Appellant, Dr. Charles Milo Connick, upon his retirement demanded a lump sum payment for his annuity contributions and the accrued interest. Appellees, Teach-

---

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

ers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF), refused to make the lump sum payment because the annuity contracts specifically state that there are no provisions for cash surrender. Connick filed an action for declaratory judgment against TIAA-CREF in which he alleged various state law claims, including breach of contract, reformation, unconscionability, misrepresentation, and changed circumstances.

Connick also alleged breach of fiduciary duties, an ERISA violation. 29 U.S.C. §§ 1001, *et seq.* The district court granted TIAA-CREF's motions to dismiss and for summary judgment. On appeal, Connick contends that the district court's action was an abuse of discretion and erroneous. We affirm.

FACTS

TIAA is a non-profit, legal reserve life insurance company. It provides a fixed retirement annuity for employees of institutions of higher education. The funds are invested in mortgages, real estate, bonds, and other debt securities. CREF is a companion non-profit organization. It provides a variable retirement annuity program for college and university employees. Its funds are invested in common stocks and other securities having equity characteristics. Both organizations are New York corporations with their principal places of business in New York.

Connick is sixty-eight years old and is a resident of Whittier, California. He served as a professor and chairman of the Department of Philosophy and Religion at Whittier College from 1946 until 1982.

On September 21, 1949, Connick also joined CREF and applied a portion of his retirement contributions to this program. In July, 1982, Connick elected to discontinue contributions to both programs. TIAA-CREF provided Connick with information on the available methods of payment of his annuities. Connick demanded a lump sum payment of his contributions and accrued interest. TIAA-CREF rejected the demand because a lump sum payment to Connick was not an available method of payment. The contributions made by Connick and Whittier College on Connick's behalf totalled $75,013.57 to TIAA and $48,986.97 to CREF.

THE ANNUITY CONTRACTS

The TIAA application specifically states that all premiums become the property of TIAA and that the contract to be issued will have no provision for cash surrender. By signing the CREF application, the applicant acknowledged that the issued certificate will have no provision for cash surrender. The certificates issued pursuant to these applications state on the front pages that they do not provide for cash surrender. Connick admits that he read the provisions containing these limitations.

Connick is the annuitant and his wife is the beneficiary in each annuity contract. Each contract provides for lump sum payments in specific situations. In the TIAA contract, a single sum payment may be paid if a corporation, association, partnership, or estate is the payee at the annuitant's death, or to the beneficiary's executor or administrator upon the death of the beneficiary if he or she survives the annuitant by forty-eight hours. The CREF contract provides for payment of the present value of the annuity benefits in a single sum to an entity, namely, a corporation, association, partnership, trustee,

or estate, if that entity becomes entitled to receive any benefit. Both contracts expressly reserve the right to pay in a lump sum the value of the accumulated units if any periodic payment to a beneficiary is less than $10.00 per month or if any beneficiary's share is less than $1,000.00.

Both annuity contracts provide for annual notices to the annuitant showing the amount of the annuity that was purchased by the contributions during that year and the amount of interest credited. In addition, TIAA and CREF voluntarily provide an "Annual Report" and an information magazine called "Investment Supplements" to the participants.

PROCEDURAL BACKGROUND

On February 7, 1984, Connick filed this action. The district court granted TIAA-CREF's original motion to dismiss or alternatively for summary judgment and allowed Connick leave to amend. Connick filed an amended complaint adding an ERISA claim.

TIAA-CREF moved to dismiss the amended complaint or alternatively for summary judgment. The district court granted both the motions on all counts. The court found that the annuity contracts preclude any lump sum distribution, that the contracts are clear and unambiguous, that Connick had notice of the no cash value provision in each contract, and that this provision had a valid business purpose and was not unconscionable. The court also found that there were no changed circumstances, no false statements or misrepresentations, and that TIAA-CREF did not violate ERISA.

DISCUSSION

Motion for Summary Judgment

Appellate courts must review motions for summary judgment under the same standards as the trial court. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). Summary judgment is appropriate when there are no issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. *Fruehauf Corp. v. Royal Exchange Assurance of America, Inc.*, 704 F.2d 1168, 1171 (9th Cir. 1983). The court shall consider all admissible affidavits and supplemental documents on a motion for summary judgment. Fed. R. Civ. P. 56.

Here, the underlying facts are not contested. The main issue is whether the annuity contracts provide for lump sum payments of contributions and interest to an annuitant upon retirement. Summary judgment is uniquely appropriate when the contract is before the court and the issue is contractual interpretation. *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 871 (9th Cir.), *cert. denied*, 444 U.S. 981 (1979).

1. Breach of Contract

Connick alleges that the "cash surrender statement on its face is vague, ambiguous and misleading" and that the annuities, when read alone or together with the voluntary TIAA-CREF publications, provide for a lump sum distribution on retirement. Connick did not supply the court with copies of the TIAA-CREF publications. A party may not defeat a summary judgment motion by reference to "phantom" documents not supplied to the court. *See Blodgett v. County of Santa Cruz*, 553 F. Supp. 1090, 1094 (N.D. Cal. 1981), *aff'd*, 698 F.2d 368 (9th Cir. 1982).

Therefore, the court need only review the annuity contracts themselves.

Words used in an insurance/annuity contract are to be interpreted in their "plain and ordinary sense." *McKee v. State Farm Fire & Casualty Co.*, 145 Cal.App.3d 772, 776, 193 Cal.Rptr. 745, 746 (1983).[1] A claim of ambiguity cannot be based on a strained interpretation of the terms of a policy. *Id.*

The TIAA and CREF contracts specifically state that they contain no provision for cash surrender. A cash surrender provision allows the owner to receive a single cash payment for the value of the policy upon termination and surrender. *See United States v. Mitchell*, 349 F.2d 94, 100 (5th Cir. 1965).

The no cash surrender provisions at issue here have been construed in four previous decisions. *See Beers v. Teachers Insurance and Annuity Association of America*, No. 29950 (Boone County, Iowa June 26 1981);[2] *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S.2d 21, 61 App. Div. 2d 537 (1978); *Overman v. Overman*, 570 S.W.2d 857 (Tenn. 1978); *Abbett v. Teachers Insurance and Annuity Association of American*, No. 7883/1968,

---

[1]This is a diversity case. Therefore, state law controls on all substantive issues including the contractual interpretation issues. *Sherman v. Mutual Benefit Life Ins. Co.*, 633 F.2d 782, 784 (9th Cir. 1980). The TIAA-CREF annuities require the application of New York law. However, New York and California law are consistent in terms of contract interpretation and the court need not enforce the contractual choice of law provisions.

[2]This case has not been reported. However, the factual situation of the case is almost indentical. The court may use directly relevant, unreported decisions for guidance. *See, e.g., Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972).

Supreme Court, New York County (July 8, 1968).[3] In every case, the court determined that the contracts do not provide for lump sum payments.

There is no merit in Connick's contention that the provisions for one sum payments to certain beneficiaries in certain instances makes these contracts ambiguous. The one sum payment provisions come into effect only when an entity becomes entitled to receive benefits upon the death of the annuitant or beneficiary.

Equally without merit is Connick's contention that TIAA-CREF breached the contracts by failing to provide annuitants without accurate annual reports of TIAA-CREF's investment results, by failing to obtain the best management and investment expertise, by failing to bring in the highest returns, and by failing to innovate since 1952. The annuity contracts do not require TIAA-CREF to perform these functions.

2. REFORMATION

Reformation of a contract is available where one party is mistaken on either the terms or effect of a contract and the other party knows or suspects that the mistaken belief existed at the time the contract was executed. *City of Cypress v. New Amsterdam Casualty Co.*, 259 Cal.App.2d 219, 66 Cal.Rptr. 357, 360 (1968).

The agreements specifically state that no cash surrender payments are available under the contract. It is unreasonable to infer that this clause would result in Connick's mistaken belief that a lump sum payment was available or that TIAA-CREF should have known that

[3]This case is also unreported but is directly relevant.

Connick would mistakenly believe that a lump sum payment was available from his reading of the agreements.

3. UNCONSCIONABILITY

Connick asserts that the annuity contracts are unconscionable because they do not provide for a lump sum payment and because they are contracts of adhesion. A contract is not unconscionable merely because the transaction involved a standardized legal form and the complaining party had less bargaining strenght. The party wishing to avoid the contract must also show that the contract contains harsh or unconscionable terms which the party would not have agreed to except for his weak bargaining position. *Keating v. Superior Court of Alameda County,* 31 Cal.3d 584, 595, 183 Cal.Rptr. 360, 365, 645 P.2d 1192 (1982).

TIAA-CREF admits that the annuities are adhesion contracts. However, the contracts do not contain harsh or unconscionable terms.

This type of contract is expressly permitted by statute. The annuities are fair and are not unjust or inequitable. The annuity provisions are not unconscionable.

4. CHANGED CIRCUMSTANCES

The Internal revenue code allows the "rollover" of lump sum distributions into Individual Retirement Accounts while maintaining tax-free status. Connick contends that this is a sufficient change of circumstances to justify the voiding of the contracts. In applying the frustration or change of circumstances excuse, the courts must determine if the fundamental reason for the contract has been frustrated to the point that performance becomes extremely impracticable. *Waegemann v. Montgomery Ward & Co., Inc.,* 713 F.2d 452, 454 (9th Cir. 1983), (citing *Cutter*

Laboratories, Inc. v. Twining, 221 Cal.App.2d 302, 315, 34 Cal.Rptr. 317, 324 (1963)). Even though laws or other governmental acts make the performance of a contract unprofitable or more expensive, the duty to perform a contractual obligation is not excused. *Rose v. Long,* 128 Cal.App.2d 824, 275 P.2d 925, 926 (1954).

Here, a change in the Internal Revenue Code does not constitute changed circumstances sufficient to frustrate the purpose of the TIAA-CREF annuity contracts. These contracts will still fulfill their purpose by providing Connick with a secure retirement income.

Connick's other contentions in opposition to appellee's motion have no merit.

5. ERISA

Connick alleges that TIAA-CREF breached its fiduciary duties under the Employment Retirement Income Security Act of 1974, 29 U.S.C. § § 1001, et seq. (ERISA) by making poor investment decisions, by having a poor earnings record, by failing to defray administrative costs, by mismanaging contributions, by relying on "in-house" managers, and by failing to update or diversify its investment practices.

ERISA requires the fiduciary of a plan subject to its provisions to discharge its duties "with the care, skill, pudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(B). The statute specificaily requires the fiduciary to act solely in the interests of the annuitants and beneficiaries for the purpose of providing benefits and defraying administrative expenses and by diversifying the investments of the plan. 29 U.S.C. § 1104.

Connick's amended complaint merely paraphrases these duties and alleges that they have been breached by TIAA-CREF.

When a party files a motion for summary judgment which is supported with the proper evidence, an adverse party may not rest upon the mere allegations of his complaint but must provide evidence setting forth specific facts showing that there is a genuine issue for trial. *See California ex rel. Dep't. of Transp. v. United States,* 561 F.2d 731 (9th Cir. 1977). Connick has failed to meet this requirement; he has failed to allege specific facts to show that there is a genuine issue for trial.

Motion to Dismiss

The district court's order granting TIAA-CREF's motion for summary judgment on all counts is affirmed. The issue of whether TIAA'CREF's motion to dismiss was properly granted is moot.

We deny TIAA-CREF's request for attorney fees. An appellate court has the discretion to award attorney fees and costs as a sanction against a frivolous appeal. Fed. R. App. P. 38. an appeal is considered frivolous when the result is obvious or appellant's arguments are wholly without merit. *DeWitt v. Western Pacific R. Co.,* 719 F.2d 1448, 1451 (9th Cir. 1983). We hold that Connick's appeal was not so lacking in merit to justify an award of attorney fees.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. CHARLES MILO CONNICK,

Plaintiff,

VS.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND,

Defendants.

Case No. 84-0834 R

ORDER GRANTING MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Entered: November 14, 1984 Filed: November 9, 1984
Date: November 5, 1984 Time: 10:00 a.m.
Courtroom: 8

On November 5, 1984 at 10:00 a.m. defendants' motion to dismiss and motion for summary judgment came on for hearing before the Honorable Manuel L. Real, Chief Judge, United States District Court for the Central District of California. J. Thomas Gilbride appeared on behalf of plaintiff, Dr. Charles Milo Cornick. Kent Keller and Steven H. Weinstein of Barger & Wolen appeared on behalf of defendants, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund. Having reviewed all of the documents filed by the parties in connection with this motion, having invited oral argument from the parties prior to the submission of this matter, and being fully advised:

IT IS ORDERED that defendants' motion to dismiss is granted as to all counts of the First Amended Complaint because, without resort to matters outside of the pleadings, the Court finds that the First Amended Complaint fails to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted as to all counts of the First Amended Complaint because, by resort to matters presented by the parties to the Court, the Court finds that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

DATED: November 9, 1984

MANUEL L. REAL
United States District Judge

B-3

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____
_____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____ of_____
_____
_____
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at_____California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

B-4

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as_____

_____

on _____ 19____ .

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 530 West Sixth Street, Ninth Floor, Los Angeles, California 90014.

On Nov. 7 1984, I served the foregoing document described as Order Granting Motion to Dismiss and Motion for Summary Judgment on _____ in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Thomas Gilbride, Esq.
7624 South Painter Avenue
Whittier, California 90602

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.
Executed on November 7, 1984, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on _____, 19____, at _____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA LEBOWSKI	/s/ Linda Lebowski
Type or Print Name	Signature

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. CHARLES MILO CONNICK,
Plaintiff,

VS.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND,
Defendants.

CASE NO. 84-0834R
SUMMARY JUDGMENT

Having considered the motion for summary judgment of Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF"), the memoranda, exhibits and declarations filed in support and in opposition to the motion, the pleadings, files, records in this case, and having determined that TIAA and CREF have sustained their burden of proof and Dr. Charles Milo Connick has failed to offer proof demonstrating the existence of genuine issues of material fact, having found that there is no genuine issue of material fact, having concluded that TIAA and CREF are entitled to judgment as a matter of law and being fully advised:

IT IS ORDERED that judgment be entered in favor of TIAA and CREF and against Dr. Charles Milo Connick on all counts in the first amended complaint in the above-captioned matter and that TIAA and CREF recover their costs of suit from Dr. Charles Milo Connick.

MANUEL L. REAL
United States District Judge

Dated: November 9, 1984

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____ of_____

_____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at_____California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as _____

_____

on _____ 19____ .

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 530 West Sixth Street, Ninth Floor, Los Angeles, California 90014.

On Nov. 7 1984, I served the foregoing document described as Summary Judgment on_____ in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Thomas Gilbride, Esq.
7624 South Painter Avenue
Whittier, California 90602

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.
Executed on November 7, 1984, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on_____, 19____,
at_____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA LEBOWSKI	/s/ Linda Lebowski
Type or Print Name	Signature

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. CHARLES MILO CONNICK,
Plaintiff,

VS.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND,
Defendants.

CASE NO. 84-0834 R
SUMMARY JUDGMENT

Having considered the motion for summary judgment of Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF"), the memoranda, exhibits and declarations filed in support and opposition to the motion, the pleadings, files and records in this case, and upon oral argument of counsel, the Court finds the following facts to be uncontroverted and from such facts draws the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. TIAA was founded in 1918 by the Carnegie Corporation and the Carnegie Foundation for the Advancement of Teaching as a non-profit life insurance company providing retirement annuities and insurance to employees of non-profit education and research institutions. TIAA is a New York corporation with its principle place of business in New York, New York.

2. TIAA provides a fixed annuity program whose underlying assets are invested in mortgages, real estate, bonds, and other debt securities.

3. CREF was established in 1952 by a special act of the New York Legislature and is a companion organization to TIAA, having the same non-profit status. It is a New York corporation with its principle place of business in New York, New York.

4. CREF provides variable retirement annuities to college employees and differs from TIAA in that its underlying assets are invested in common stocks and other securities having equity characteristics.

5. The TIAA and CREF programs are employee benefit plans and are governed by the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et. seq.*

6. Dr. Connick is a professor emeritus and former Chairman of the Department of Philosophy and Religion at Whittier College. He currently serves as a Trustee. Dr. Connick's period of employment by Whittier College was from 1946 to 1982. He is now 67 years old and is a citizen of California.

7. Whittier College established a pension plan with TIAA in 1946.

8. When CREF was authorized in 1952, Whittier College permitted it employees to allocate premiums to CREF certificates.

9. Dr. Connick applied for a TIAA annuity on September 21, 1949.

10. The application signed by Dr. Connick for the TIAA annuity specifically stated above his signature that all premiums became the property of TIAA and that the contract to be issued would not have provisions for cash surrender.

11. On July 2, 1952, Dr. Connick applied for a CREF certificate. The CREF certificate also provided immedi-

ately above the signature line that Dr. Connick acknowledged that the certificate to be issued had no provision for cash surrender.

12. The TIAA annuity certificate and the CREF annuity certificate both expressly state on the front pages that they do not provide for cash surrender.

13. Within the Whittier College retirement plan resolution, the annuitants were permitted to participate directly in the investment options available under the TIAA-CREF system by changing the allocation of premiums between TIAA and CREF in accordance with performance of these funds.

14. Both Dr. Connick and Whittier College would make contributions to the TIAA annuity and the CREF annuity.

15. In July of 1982, Dr. Connick elected to discontinue his contribtuions as of August 31, 1982.

16. Dr. Connick's scheduled annuity starting date was March, 1982, his sixty-fifth birthday.

17. In response to Dr. Connick's July, 1982 letter terminating contributions, TIAA and CREF provided information to Dr. Connick concerning payment of his annuity income and enquiring as to which annuity payment program Dr. Connick wanted to select. There followed, in 1982 and 1983, an exchange of correspondence, in which Dr. Connick demanded a cash surrender and TIAA-CREF explained that a cash surrender was not available.

18. After exchange of further correspondence, Dr. Connick commenced this lawsuit.

19. If Dr. Connick had begun retirement income in September, 1984, as previously scheduled, his very first

payment would have returned approximately 76%-83% of the sums he contributed, depending on the option he selected. In one year, he could have recovered more than his contribution.

20. By September, 1987, or within four years from the commencement of this lawsuit, Dr. Connick will also have recovered his employer's contributions.

21. After September, 1987, Dr. Connick can receive approximately $25,000 to $35,000 a year for the rest of his life and his wife's life as well, or for a minimum of 20 years even if they both die, depending on the options selected by Dr. Connick.

22. Both the TIAA and CREF contracts expressly provide at the bottom of the front page that "it makes no provisions for cash surrender or loans, and cannot be assigned."

23. The TIAA and CREF contracts on their face preclude any cash value distribution.

24. The no cash value provisions are not inconsistent with any of the wording or terms contained in the TIAA and CREF contracts. The no cash value provision contained in the TIAA and CREF contracts are unambiguous.

25. The no cash value provisions contained in the TIAA and CREF contracts are not rendered ambiguous by any publications of TIAA or CREF.

26. Dr. Connick had notice of the provisions regarding cash surrender value as contained in the TIAA and CREF contracts, as contained in the application for the TIAA and CREF contracts and as contained in publications of TIAA and CREF.

27. The no cash value provision contained in the TIAA and CREF contracts was not arbitrary or capricious, but was for a valid business purpose. Neither the provision nor the contracts are unconscionable and do not penalize Dr. Connick.

28. No false statement or misrepresentation was made by TIAA and CREF to Dr. Connick.

29. From the time the TIAA and CREF contracts were entered into by Dr. Connick and TIAA and CREF, no changed circumstances occurred whereby Dr. Connick could excuse himself from performance of his obligations under the TIAA and CREF contracts.

30. Dr. Connick is not entitled to a lump-sum distribution.

31. TIAA and CREF have not engaged in any act in breach of the TIAA and CREF agreements or any obligations arising from these agreements.

32. TIAA and CREF did not act in bad faith, or with actual malice or wanton indifference in refusing to make a lump-sum distribution to Dr. Connick.

33. Dr. Connick did not establish the existence of any genuine issues of material fact with respect to the discharge of TIAA and CREF's duties under ERISA.

34. Any Conclusion of Law that is deemed to be an Uncontroverted Fact is incorporated herein by reference.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. Section 1332.

2. It is a judicial function to interpret the annuity contracts and to determine whether they are ambiguous.

3. In interpreting the TIAA and CREF contracts in their plain and ordinary sense, the contracts are not ambiguous and do not provide for a cash surrender value.

4. Dr. Connick is not entitled to receive a lump-sum distribution.

5. TIAA and CREF did not breach the annuity contracts nor did they breach any obligations arising out of the annuity contracts.

6. Dr. Connick is not entitled to reformation in that there was no mistake, the contracts are not unconscionable, there were no changed circumstances or frustration of purpose justifying an avoidance of the contracts, and at no time did TIAA or CREF misrepresent to Dr. Connick that he was not entitled to a lump-sum distribution under the annuity contracts.

7. TIAA and CREF did not violate ERISA.

8. Any uncontroverted fact that is deemed to be a Conclusion of Law is incorporated herein by reference.

WHEREFORE, TIAA and CREF are entitled to judgment against Dr. Connick on all counts in his first amended complaint in this action.

DATED: November 9, 1984

United States District Judge

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____
_____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____
of_____
_____
_____
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____,
a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at_____California.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____
Type or Print Name Signature

B-17

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as_____

_____

on _____ 19____ .

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 530 West Sixth Street, Ninth Floor, Los Angeles, California 90014.

On Nov. 7 1984, I served the foregoing document described as Amended Statement of Uncontroverted Facts and Conclusions of Law on_____
in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Thomas Gilbride, Esq.
7624 South Painter Avenue
Whittier, California 90602

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.
Executed on November 7, 1984, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on_____, 19____,
at_____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA LEBOWSKI	/s/ Linda Lebowski
Type or Print Name	Signature

APPENDIX C

29 USCA
§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United states because they are afforded preferential Federal tax treatment; *that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement*

benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) *It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

(c) It is hereby further declared to be the policy of this act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Pub.L. 93-406, Title I, § 2, Sept. 1974, 88 Stat. 832.

29 USCA
§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 USCA
§ 1001a. Additional congressional findings and declaration of policy

(a) The congress finds that —

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4) (A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that —

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of this Act —

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

(Pub.L. 96-364, § 3, Sept. 26, 1980, 94 Stat. 1209.)

29 USCA
§ 1002. Definitions

For purposes of this subchapter:

[See main volume for text of (1)]

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter provideng one or more exempt categories under which —

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of

living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than . . . which is the evasion of the standards or purpose of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

[See main volume for text of (3) to (13)]

(14) The term "party in interest" means, as to an employee benefit plan —

[See main volume for text of (A) to (I)]

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regualtions for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

[See main volume for text of (15) to (32)]

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B) for its employees (or their beneficiaries) by a church or by a convention or associa-

tion of churches which is exempt from tax under section 501 of Title 26.

(B) The term "church plan" does not include a plan —

(i) which is established and maintained primarily for the benefit of employees (or their benficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of Title 26), or

(ii) if less than substantially all of the individuals included on the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph —

(i) A plan estabished and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if said organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes —

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separate from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or asociation of churches, the church plan shall not fail to meet . . .

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in

the church plan, within the meaning of section 72(m)(7) of Title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means —

(I) the period ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

[See main volume for text of (34) to (36)]

(37) (A) The term "multiemployer plan" means a plan —

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this subchapter, notwithstanding the preceding provisions of this paragraph for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in this paragraph (37) as in effect immediately before such date.

(E) Within one year after September 26, 1980, a multiemployer plan may irrevocably elect, pursuant to procedures establish by the corporation and subject to the

provisions of sections 1453(b) and (c) of this title, that the plan shall not be treated as a multiemployer plan for all purposes under this chapter or Title 26 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980 —

(i) the plan was not a multiemployer plan because the plan was not a plan described in subparagraph (A)(iii) of this paragraph and section 414(f)(1)(C) of Title 26 (as such provisions were in effect on the day before September 26, 1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

[See main volume for text of (38) and (39)]

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained —

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or

(ii) by a rural electric cooperative.

(B) For purposes of this paragraph —

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 1301(b) of this title, except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent, and

(iv) the term "rural electric cooperative" means —

(I) any organization which is exempt from tax under section 501(a) of Title 26 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of such Title 26 and at least 80 percent of the members of which are organizations described in subclause (I).

(As amended Pub.L. 96-364, Title III, §§ 302, 305, Title IV, §§ 407(a), 409, Sept. 26, 1980, 97 Stat. 1291, 1294, 1303, 1307; Pub.L. 97-473, Title III, § 302(a), Jan. 14, 1983, 96 Stat. 2612.)

29 USCA
§ 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real proerty or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) —

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877.

29 USCA
§ 1106. Prohibited transactions

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, or any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or representative party) whose interests are adverse to the interests of the party, the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

Pub.L. 93-406, Title I, § 406, Sept. 2, 1974, 88 Stat. 879.

. . . (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law:

(3) until June 30, 1984, to the sale, exchange, or other disposition of property described in paragraph (2) between a plan and a party in interest if —

(A) in the case of a sale, exchange, or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less that the fair market value of the property at the time of such disposition; and

(B) in the case of the acquisition of the property by the plan, the plan pays an amount which is not in excess of the fair market value of the property at the time of such acquisition;

(4) Until June 30, 1977, to the provision of services, to which paragraphs (1), (2), and (3) do not apply between a plan and a party in interest —

(A) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or

(B) if the party in interest ordinarily and customarily furnished such services on June 30, 1974, if such provision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if such provision of services was not, at the time of such provision, a prohibited transaction (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law; or

(5) the sale, exchange, or other disposition of property which is owned by a plan on June 30, 1974, and all times thereafter, to a party in interest, if such plan is required

to dispose of such property in order to comply with the provisions of section 1107(a) of this title (relating to the prohibition against holding excess employer securities and employer real property), and if the plan receives not less than adequate consideration.

(d) Any election, or failure to elect, by a disqualified person under section 2003(c)(1)(B) of this Act shall be treated for purposes of this part (but not for purposes of section 1144 of this title) as an act or omission occurring before the effective date of this part.

Pub.L. 93-406, Title I, § 414, Sept. 2, 1974, 88 Stat. 889.

29 USCA

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought —

(1) *by a participant or beneficiary* —

(A) for the relief provided for in subsection (c) of this section, or

(B) *to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;*

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Plans qualified under Internal Revenue Code

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been fully determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines

---

[1]So in original.

that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Status of employee benefit plan as entity

(d)(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Plans qualified under Internal Revenue Code

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been fully determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines

---

[1]So in original.

that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Status of employee benefit plan as entity

(d)(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Jurisdiction

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Attorney's fees and costs

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion

may allow a reasonable attorney's fee and costs of action to either party.

Service upon Secretary of Labor and Secretary of Treasury

(h) A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a) (1) (b) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discrètion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Administrative assessment of civil penalty

(i) in the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall

not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

Direction and control of litigation by Attorney General

(j) In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

Jurisdiction of actions against Secretary of Labor

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. CHARLES MILO CONNICK
Plaintiff(s)
VS.
TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND
Defendant(s)

CASE NUMBER
CV-84 0834 R
SUMMONS
ON FIRST AMENDED COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S), You are hereby summoned and required to serve upon

J. THOMAS GILBRIDE

Plaintiff's attorney, whose address is:
7624 S. Painter Avenue
Whittier, California 90602

an answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: July 27, 1984

LEONARD A. BROSNAN,
CLERK

By /s/ Chas. Metz
Deputy Clerk

(SEAL OF THE COURT)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DR. CHARLES MILO CONNICK,
Plaintiff,
-VS-
TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND,
Defendants.

CASE NO.: 84 0834 R
FIRST AMENDED COMPLAINT
1) Breach of Contract
2) Mistake-Reformation
3) Unconscionability
4) Misrepresentation
5) Changed Circumstances
6) Declaratory Relief
7) Breach of Insurance and Statutory Duty
8) Breach of Fiduciary Duty

DR. C. MILO CONNICK hereafter referred to as Plaintiff complains of Defendants and each of them and alleges as follows:

FIRST COUNT
(Breach of Contract)

1.

That Plaintiff Dr. C. Milo Connick is an Emeritus Professor and Chairman of the Department of Philosophy and Religion at Whittier College. Dr. Connick is a resident of the City of Whittier, County of Los Angeles and State of California, and is sixty-six (66) years old.

2.

That Defendant TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA (hereinafter "TIAA") is a legal reserve life insurance and annuity company incorporated in the State of New York. It provides fixed-dollar retirement annuities, individual and group life insurance and group medical and long-term disability insurance. Plaintiff is informed and believes and thereon alleges that TIAA has assets in excess of $10 billion.

3.

That Defendant COLLEGE RETIREMENT EQUITIES FUND (hereinafter "CREF") was established in 1952 to provide variable annuities. It operates as a companion non-profit corporation to TIAA also incorporated in the State of New York. Plaintiff is informed and believes and thereon alleges that CREF has assets in excess of $9 billion.

4.

That Plaintiff invokes the jurisdiction of this Court under 28 USC 1332 (Diversity of Citizenship); that the matter in controversy exceeds, exclusive of interest and costs the sum of $10,000.00.

5.

That Defendants TIAA and CREF provide the above alleged related services to public and private colleges and universities including Whittier College, California.

6.

That Plaintiff has been employed by Whittier College from September 1946 to 1982.

7.

That on September 1, 1946 the Board of Trustees of Whittier Colleges by resolution established a pension plan with TIAA and later through various amendments established a plan with CREF.

8.

That on September 21, 1949 Plaintiff on one hand and Defendant TIAA on the other entered into a written retirement annuity. A copy of said Agreement is attached hereto marked EXHIBIT "A" and incorporated herein by reference.

9.

That on July 1, 1952 Plaintiff on one hand and Defendant CREF on the other entered into a written "Periodic Premium Retirement Unit Annuity". A copy of said Agreement is attached hereto marked EXHIBIT "B" and incorporated herein by reference.

10.

That under both plans Plaintiff and Whittier College made contributions to the individual annuities issued by Defendants TIAA and CREF. That the individual annuities run directly from Defendants TIAA and CREF to Plaintiff and Whittier College does not have any contractual participation in these annuities.

11.

That contributions by Whittier College are made by and on behalf of Plaintiff and the funds so accumulated become immediately and irrevocably vested in him so that he owns full rights to such funds. The annuity plans are fully funded in each year of participation.

12.

That as of September 22, 1982 Plaintiff's combined CREF and TIAA funds were valued at $203,000.00.

13.

That the above alleged contracts have been unilaterally changed and amended by Defendants TIAA and CREF throughout the years and are Contracts of adhesion prepared by Defendants TIAA and CREF and not signed by Plaintiff.

14.

That the TIAA and CREF contracts above alleged, state in part: "This Contract makes no provision for cash surrender. . ." That elsewhere in the TIAA and CREF contracts, they specifically provide for the payment of funds in "One Sum" to various entities. The cash surrender statement on its face is vague, ambiguous, misleading and subject to various reasonable constructs.

15.

That at or about the time the above alleged Contracts of Defendants were sent to Plaintiff and subsequently to date, Defendants and each of them have drafted many publications and documents relating to the TIAA and

CREF Programs and distributed them to Plaintiff. The publications and documents explain the initial contracts sent to Plaintiff and the TIAA and CREF contracts must be read and interpreted in conjunction with these publications and documents sent to Plaintiff. An example of such a document is the Report of Annuity Premiums and Benefits sent to Plaintiff each year. It refers, *inter alia,* to Plaintiff's total accumulations and gives the "year-end value of the accumulation units you own, worth each." Further, the Report of Annuity Premium and Benefits states that Plaintiff's CREF accumulation units are "like shares of ownership in a broadly diversified common stock fund." Other publications and documents of TIAA and CREF further the clear impression that Plaintiff had full ownership rights of his funds on deposit with TIAA and CREF and the clear right to obtain a lump-sum distribution. Based on the contracts from TIAA and CREF and subsequent explanatory documents from TIAA and CREF, Plaintiff was under the understanding that he had the right to obtain his funds on deposit with TIAA and CREF in one sum when he retired.

16.

That pursuant to the terms of the above alleged agreements (specifically at Paragraph 9 of the TIAA Agreement) Defendants agreed to provide to Plaintiff, full, honest and accurate reports of his investments.

17.

That at the time Plaintiff entered into the above alleged agreements with Defendants and at various times thereafter, Defendants and each of them further represented to

Plaintiff and Plaintiff understood from Defendants publications and reports that:

a. Defendants would provide to Plaintiff full honest and accurate reports of the investment results of Defendants.

b. Defendants would obtain the best management and investment expertise to Defendants.

c. Defendants would make the best investments on behalf of Plaintiff to bring the highest return on Plaintiff's contributions.

d. Defendants would maintain current their investment practices and procedures to best serve Plaintiff.

e. Plaintiff could "roll over" into a program of his choice or have a complete distribution of his accounts at the time of his retirement of the amount of funds he contributed into the funds and the accumulated earnings thereon.

18.

That on or about September 1, 1982 Defendants and each of them breached their Agreements with Plaintiff as follows:

a. Defendants have failed to provide to Plaintiff full, honest and accurate reports of his investments.

b. Defendants have failed to provide to Plaintiff full, honest and accurate reports of the investment results of Defendants in that Defendants have ignored performance results of some years and have changed its reporting procedures various times to

make it appear the plans were more successful that they in fact were.

c. Defendants have failed to obtain the best management and investment expertise in that they use only internal investment managers who are unaccountable to the investors.

d. Defendants have failed to make the best investments to bring the highest return on Plaintiff's contributions in that the plans have failed to even earn sufficient to keep pace with inflation.

e. Defendants have failed to maintain current their investment practices and procedures in that, unlike other retirement plans, they have failed to innovate since 1952.

f. Defendants have failed and refused to tender to Plaintiff his funds, when so requested.

19.

That prior to September 1, 1982 Plaintiff justifiably relied on the representations, contracts and documents of Defendants. That as a result of that reliance Plaintiff continued to voluntarily deposit substantial additional funds with Defendants.

20.

That Defendnats TIAA and CREF impose a substantial loading charge on all deposits made to them. The current charges are 3.5% for TIAA and 1.75% for CREF. In addition, CREF imposes a further charge on funds on deposit with it to cover its investment costs.

21.

That notwithstanding these substantial charges, said Defendants further breached their agreements with Plaintiff in that the performances of TIAA and CREF have been remarkably poor. If Plaintiff were allowed to obtain his funds on deposit with TIAA and CREF and roll them over into an Individual Retirement Account, he could obtain a substantially better rate of return than that provided for by TIAA and CREF and provide substantially more money for himself and his family during his retirement years.. Further, he would be able to protect the principal.

22.

That recent attempts to secure a lump sum distribution from TIAA and CREF and roll the funds over into an Individual Retirement Account as provided for in §§ 403(b)(8) and 402(e)(A) of the Internal Revenue Code have proved unsuccessful as TIAA and CREF have refused to release Plaintiff's funds to him.

23.

That Plaintiff has performed all conditions on his part to be performed.

24.

That as a proximate result of the breach of said Defendants, Plaintiff has been unable to obtain his funds from them; invest them at a substantially higher yield and has been damaged in an amount in excess of $290,000.00 according to proof.

SECOND COUNT

(Mistake-Reformation)

25.

That Plaintiff refers to Paragraph 1-24 of the First Count and repleads the same as though here set forth at length.

26.

That the above alleged agreements were drafted by Defendants and Plaintiff commenced his contributions according to their terms in reasonable reliance on the above representations of Defendants.

27.

That Plaintiff is informed and believes and thereon alleges that said Defendants knew or had reason to know that Plaintiff had been led to believe the truth of the representations as set forth at Paragraph 17 of this pleading; and in reliance thereon Plaintiff paid all monies required by Defendants.

28.

That but for the above alleged assurances of Defendants Plaintiff would not have continued increasing his contributions to said plans.

29.

That documents subsequently sent to him by TIAA and CREF including, but not limited to, the Annual Report of Annuity Premiums and Benefits, fostered the understanding of Plaintiff as to the duties of Defendants as set

forth above in Paragraph 17. Plaintiff exercised reasonable care in the interpretation and reading of the documents. Enforcement of the agreement as interpreted by TIAA and CREF would be oppressive and unconscionable. TIAA and CREF has not and will not suffer any prejudice or harm if the agreements are reformed to conform to Plaintiff's understanding of the bargain. If the agreements are not so reformed, Plaintiff will suffer substantial prejudice and financial detriment.

30.

That by reason of the aforesaid mistake, Plaintiff is entitled to the relief requested in the Prayer.

THIRD COUNT

(Unconscionability)

31.

Plaintiff refers to Paragraphs 1-24 of the First Count and repeats and repleads the same as though here set forth at length.

32.

That virtually all of Plaintiff's retirement program is with TIAA and CREF. In reliance upon their above alleged representations, Plaintiff voluntarily deposited substantial additional sums with TIAA and CREF in the belief that Defendants would perform their obligations as set forth in Paragraphs 16 and 17 as above alleged. Further, Plaintiff has continued employment with Whittier College upon the belief that the funds Whittier deposited with TIAA and CREF would be available to him upon his retirement. The agreements and documents

in question were drafted by TIAA and CREF and are adhesion contracts. Plaintiff had no opportunity to participate or negotiate any change in these agreements and there is a substantial disparity in bargaining power between TIAA/CREF and Plaintiff.

33.

That the interpretation TIAA and CREF place upon the contract documents that Defendants are under no obligation to provide to Plaintiff the items set forth in Paragraphs 16 and 17 above would substantially penalize Plaintiff and could result in forfeiture of substantial sums of Plaintiffs money to TIAA and CREF. Such a result is unconscionable and inequitable.

34.

That by reason of the aforesaid unconscionable interpretation of the agreements suggested by TIAA and CREF and the refusal of TIAA and CREF to grant to Plaintiff his funds in a lump sum distribution, this court should declare such an interpretation unconscionable and inequitable and grant Plaintiff the relief requested in the Prayer.

FOURTH COUNT

(Misrepresentation)

35.

That Plaintiff refers to Paragraphs 1-24 of the First Count and repeats and repleads the same as though here set forth at length.

That in the documents and publications tendered to Plaintiff, TIAA and CREF have made material misrepre-

sentations of fact regarding the extent and nature of ownership and control Plaintiff has in his funds on deposit with Defendants TIAA and CREF. Those representations are alleged in Paragraphs 16 and 17 above. Plaintiff justifiably relied on these representations since they were included in Defendants TIAA and CREF drafted documents and publications. These misrepresentations are so fundamental in character so as to have absolutely precluded a meeting of the minds.

36.

That by reason of the aforesaid misrepresentations, Plaintiff is entitled to the relief requested in the Prayer.

FIFTH COUNT

(Changed Circumstances)

37.

That Plaintiff refers to Paragraphs 1-24 of the First Count and repeats and repleads the same as though here set forth at length.

38.

That in 1978 the Revenue Act of 1978 was signed into law allowing, for the first time, professors and school teachers to roll-over lump sum distributions into an Individual Retirement Account and defer the payment of income taxes until withdrawals begin. IRC § 403(b)(8). This radical change in the Internal Revenue Code constitutes a material change affecting the bargain in the TIAA and CREF agreements.

39.

That by reason of the aforesaid material change in the directly applicable tax laws, this court should grant Plaintiff the relief requested in the Prayer.

SIXTH COUNT

(Declaratory Relief)

40.

That Plaintiff refers to Paragraphs 1-24 of the First Count and repeats and repleads the same as though here set forth at length.

41.

That an actual controversy has arisen and now exists between the Plaintiff and Defendants concerning their respective rights and duties.

42.

That Plaintiff contends that the TIAA and CREF contracts and the subsequent explanatory documents are vague, ambiguous and susceptible to more than one construction on the question of Plaintiff's entitlement to a single sum distribution and the obligations of Defendants as set forth in Paragraphs 16 and 17 above. Plaintiff contends he is entitled to such single sum distribution under the above alleged contracts and entitled to the performance by Defendants of their duties as set forth above.

43.

That Plaintiff is informed and believes and thereon alleges that Defendants contend Plaintiff is not entitled to a single sum distribution under the above alleged contracts; nor is Plaintiff entitled to the performance by Defendants of the duties set forth above.

44.

That Plaintiff desires a judicial determination as set forth in Plaintiffs Prayer.

SEVENTH COUNT

(Breach of Fiduciary Duty)

45.

The Plaintiff refers to Paragraphs 1-44 of the previous counts and repeats and repleads the same as though here set forth at length.

46.

That the above alleged plans herein are ERISA (29 USC §§ 1002, 1003) regulated plans.

47.

That by virtue of the above alleged contracts and agreements Defendants are fiduciaries to Plaintiff pursuant to 29 USCS § 1103.

48.

That Plaintiff is a person defined under 29 USCS § 1132 as empowered to bring a civil action against Defendants.

49.

That pursuant to 29 USCS § 1103 Defendants had the following duties which it owed to Plaintiff:

a. Defendants must discharge its duties with respect to a plan solely in the interests of the plan participants and beneficiaries.

b. Defendants must act for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.

c. Defendants must conduct the affairs of the plan with the care, skill, prudence and diligence under the circumstances then prevailing.

d. Defendants are required to diversify the investments of the plan so as to minimize the risk of large losses.

e. Defendants must act in accordance with the documents and instruments governing the plan.

f. Defendants must send full, honest and accurate reports of Plaintiffs investment to him on an annual basis.

g. Defendants must obtain the best management and investment expertise available to Defendants.

h. Defendants must make the best investments to bring the highest return on Plaintiffs contributions.

i. Defendants must maintain current their investment practices and procedures to best serve Plaintiff.

50.

That Defendants have breached the above alleged covenants of good faith and fair dealing in that:

a. Defendants have failed to discharge its duties with respect to the plan solely in the interests of the plan participants and beneficiaries.

b. Defendants have failed to act for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.

c. Defendants have failed to conduct the affairs of the plan with the care, prudence and diligence under the circumstances then prevailing.

d. Defendants failed to diversify the investments of the plan so as to minimize the risk of large losses.

e. Defendants failed to act in accordance with the documents and instruments governing the plan.

f. Defendants have refused to allow Plaintiff to remove his funds from Defendants.

g. Defendants have repeatedly changed its reporting periods and have sent inaccurate and incomplete and selective information to Plaintiff regarding Defendants performance.

h. Defendants have failed to obtain outside management and expertise and rely solely on "in house" managers.

i. Defendants have made poor investment decisions, have a poor earning record and have failed to

maintain current their investment practices and procedures.

j. Defendants have failed to maintain current their investment practices and procedures.

51.

That pursuant to 29 USC 1109 and as a proximate result of the above alleged breach by Defendants, Plaintiff has been damaged as above alleged and is entitled to be awarded any equitable relief as the court deems appropriate.

WHEREFORE,

Plaintiff prays Judgment against Defendants and each of them as follows:

1. General damages in excess of $280,000.00 according to proof;
2. A judicial determination that the TIAA and CREF contracts and subsequent explanatory documents are vague, ambiguous and susceptible to more than one construction. That Plaintiff is entitled to a single sum distribution upon demand of all vested monies in his name;
3. For reasonable attorney fees.
4. For costs of suit incurred herein.
5. For such other relief as the court may deem just and proper.

DATED: July 26, 1984

/s/ J. Thomas Gilbride
J. THOMAS GILBRIDE

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

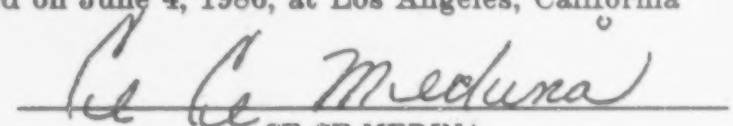
On June 4, 1986, I served the within Petition for a Writ of Certiorari in re "Dr. Charles Milo Connick vs. Teachers Insurance and Annuity Association of America and College Retirement Equities Fund" in the United States Supreme Court, October Term, 1986 No. _____;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Kent Keller
Steven H. Weinstein
Barger & Wolen
530 West 6th Street Ninth Floor
Los Angeles, CA 90014
(213) 680-2800
Opposing Counsel

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 4, 1986, at Los Angeles, California



CE CE MEDINA

Supreme Court, U.S.
FILED
JUL 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2012

In the Supreme Court

OF THE

United States

October Term, 1986

DR. CHARLES MILO CONNICK,
Petitioner,
VS.
TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA AND
COLLEGE RETIREMENT EQUITIES FUND,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

KENT KELLER
STEVEN H. WEINSTEIN
BARGER & WOLEN
530 West Sixth Street
Ninth Floor
Los Angeles, California
(213) 680-2800
Attorneys for Respondent

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

TABLE OF CONTENTS

Page

1.

Introduction 1

2.

The Petition Does Not Raise Important Questions of General Interest 3

3.

The Ninth Circuit Correctly Affirmed the District Court's Grant of Summary Judgment 5

4.

Conclusion 7

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Liberty Lobby, Inc., ____ U.S. ____ (Slip Opinion, June 25, 1986) 4

Connick v. Teachers Ins. and Annuity Ass'n, 784 F.2d 1018 (9th Cir. 1986) 3, 5, 6

Ed Houser Enterprises v. General Motors Corp., 595 F.2d 366 (7th Cir. 1978) 4

Gans v. Mundy, 762 F.2d 338 (3d Cir. 1985) 4

Glenway Industries, Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415 (6th Cir. 1982) 4

Howard v. Russell Stover Candies, Inc., 649 F.2d 620 (8th Cir. 1981) 4

Maiorana v. MacDonald, 596 F.2d 1072 (1st Cir. 1979) 4

Massachusetts Mutual Life Insurance Co. v. Russell, ____ U.S. ____, 105 S.Ct. 3085 (1985) 5

Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d 838 (11th Cir. 1985) 4

United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975) 4

Rules

Rules of the United States Supreme Court, Rule 17 3, 4

Rules of the United States Supreme Court, Rule 17.1(a) 4

Rules of the United States Supreme Court, Rule 17.1(b) 4

Rules of the United States Supreme Court, Rule 17.1(c) 4

TABLE OF AUTHORITIES

Page

Textbooks

Moore's Federal Practice, ¶ 56.23 at p. 56-1394 (Rev. 1985) 4

Wright, Miller, Cooper & Gresman, Federal Practice and Procedure (1977 Rev.) Sec. 4004, p. 507.... 5

Wright, Miller and Kane, Federal Practice and Procedure, Sec. 2716, p. 643 (1983 ed.) 4

No. 85-2012

In the Supreme Court

OF THE

United States

October Term, 1986

DR. CHARLES MILO CONNICK,
Petitioner,

VS.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA AND
COLLEGE RETIREMENT EQUITIES FUND,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

The issue raised by Dr. Connick's[1] Petition is whether the Ninth Circuit misapplied the standard of review applicable to the grant of sumary judgment. That issue does not present a matter that is in conflict in the federal circuits or an important question of federal law not

[1]Throughout this brief Petitioner, Dr. Charles Milo Connick, is referred to as "Dr. Connick."

previously addressed by this Court. In short, the petition does not involve the kinds of special issues of general importance typically required for a hearing in this Court.

Dr. Connick's First Amended Complaint[2] consists of seven counts. The first six counts involve the same issue; fairly read, do the TIAA-CREF[3] annuities require a cash surrender, lump sum payment. The district court and the Ninth Circuit have answered that the annuities do not require such a payment, and Dr. Connick seems to have finally abandoned this argument. While not entirely clear, it appears that the sole issue raised by this petition concerns the seventh count — Dr. Connick's ERISA claim.

As regards to the ERISA claim, all the Ninth Circuit decided was that Dr. Connick had failed to offer any competent evidence suggesting the existence of a triable issue of fact, and that summary judgment was therefore appropriate. Dr. Connick concedes that the standard used by the Ninth Circuit for reviewing the district court's grant of summary judgment was appropriate, he simply contends that the Ninth Circuit misapplied its own standard. As such, the petition raises a very narrow issue: Did the Ninth Circuit misapply the standard for affirming the grant of summary judgment. Such an issue is one of individual justice, not of general interest, and is not appropriate for treatment by a writ of certiorari.

---

[2]See, Petition, Appendix D-1 through D-18.

[3]Throughout this brief Respondents, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund, are referred to as "TIAA-CREF."

2.

THE PETITION DOES NOT RAISE IMPORTANT QUESTIONS OF GENERAL INTEREST

Rule 17 of the Supreme Court Rules states three general guidelines that, "while neither controlling nor fully measuring the Court's discretion," suggest the type of cases for which a writ of certiorari is appropriate. The first guideline concerns situations in which one circuit has reached a decision in conflict with the decision of another circuit on the "same matter." Here the only decision challenged by this petition is the granting of summary judgment on an ERISA claim. With respect to granting of a summary judgment itself, a conflict between the circuits is highly unlikely, since the individual situation presented will determine the result and thus the requirement of the "same matter" is inapplicable. However, the legal standard of review used by the Ninth Circuit could, of course, present a question of federal law as to which circuits could differ.

The Ninth Circuit began its discussion of the legal principles presented by this case with an explanation of the standard of review. The court states at page 1020:[4]

> "Appellate courts must review motions for summary judgment under the same standard as the trial court. (Citation omitted.) Summary judgment is appropriate where there are no issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. (Citation omitted.) The court shall consider all admissible affidavits and

---

[4]All page citations to the Ninth Circuit's decision refer to the reported opinion, *Connick v. Teachers Ins. and Annuity Ass'n*, 784 F.2d 1018 (9th Cir. 1986).

supplemental documents on a motion for summary judgment. (Citation omitted.)"

If the Ninth Circuit had stated a standard at variance with that used in other circuits, an issue within the scope of Rule 17.1(a) might have been presented. However, the foregoing standard is common for all federal circuits.[5] Thus, this case does not present a matter as to which federal courts have different rules.

Subsection (b) of Rule 17.1 involves state court decisions and is therefore irrelevant. Subsection (c) applies when either a state or federal court "has decided an important question of federal law which has not been, but should be, settled by this Court. . . ." Not only is this standard of review stated by the Ninth Circuit common among federal courts, but this court recently followed this standard in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____ (Slip Opinion, June 25, 1986).

Thus, the guidelines of Rule 17 are not met in this case. Ultimately, Dr. Connick's disagreement with the Ninth Circuit is not over the rule of law, but how that rule is applied. Such a disagreement falls under the heading of a case seeking "individual justice" which historically this Court has been disinclined to hear by a writ of certiorari.

---

[5] *See e.g. Gans v. Mundy*, 762 F.2d 338, 340-41 (3d Cir. 1985); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); *Glenway Industries, Inc. v. Wheelabrator-Frye, Inc.*, 686 F.2d 415, 417 (6th Cir. 1982); *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 623 (8th Cir. 1981); *Maiorana v. MacDonald*, 596 F.2d 1072, 1076 (1st Cir. 1979); *Ed Houser Enterprises v. General Motors Corp.*, 595 F.2d 366 (7th Cir. 1978); *United States Steel Corp. v. Darby*, 516 F.2d 961, 963 (5th Cir. 1975); *Moore's Federal Practice*, ¶56.23 at p. 56-1394 (Rev. 1985); Wright, Miller and Kane, *Federal Practice and Procedure*, § 2716 at p. 643 (1983 ed.).

Wright, Miller, Cooper & Gresman, *Federal Practice and Procedure*, § 4004 at 507 (1977 Rev.).

3.

THE NINTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

In an effort to escape the "individual justice" conclusion, the petition asserts that the Ninth Circuit disregarded this Court's decision in *Massachusetts Mutual Life Insurance Ins. Co. v. Russell*, ____ U.S. ____, 105 S.Ct. 3085 (1985). In fact, while the parties had briefed *Russell*, the Ninth Circuit makes no mention of this decision because it had no effect on its ruling. Dr. Connick seems to argue that under *Russell* he had standing to assert an ERISA claim. While the extent of the claim Dr. Connick could assert was the subject of some dispute in the court below, Dr. Connick's basic standing to raise the claim has never been disputed. Thus, the significance of *Russell* to this case, as viewed by Dr. Connick, is not clear.

As regards to Dr. Connick's ERISA claim, all the Ninth Circuit determined was that Dr. Connick had failed "to allege specific facts to show that there is a genuine issue for trial." *Connick, supra* at 1022. The Ninth Circuit never intimated that Dr. Connick did not have standing to pursue his claims. It determined that he had failed to meet the force of the summary judgment motion. Thus, whatever the ultimate dimensions of *Russell* are determined to be, this case does not raise a *Russell* issue.

With respect to the grant of summary judgment, it is important to note what the petition overlooks. TIAA-CREF prevailed on their initial motion on July 23, 1984. While the motion was granted, leave to amend was also

granted. Within a matter of days thereafter, Dr. Connick filed a First Amended Complaint which was almost a copy of the original complaint. Significantly, no new factual matters were alleged. The major change was that Dr. Connick dropped state law claim and added the ERISA claim. Thereafter TIAA-CREF again moved for summary judgment which also was granted.

At no time from the commencement of this action in February, 1984 until its disposition almost eight (8) months later in November 1984, did Dr. Connick conduct, or ever attempt to conduct any discovery. The sole "evidence" which Dr. Connick relied upon was a magazine article written by a gentleman critical of TIAA-CREF. As respects the charge of ERISA violations, all Dr. Connick apparently did was read this article and file a complaint. Under these circumstances the Ninth Circuit correctly determined that Dr. Connick could not rest "on the mere allegations of his complaint," and that Dr. Connick had failed "to allege specific facts" indicating the existence of a triable issue of fact. *Connick, supra* at 1022.

Finally, Dr. Connick's petition does not suggest disagreement with the Ninth Circuit's conclusion that TIAA-CREF annuities are not ambiguous. As Dr. Connick appears to have abandoned all of the claims in the first six counts of the First Amended Complaint, TIAA-CREF do not discuss these matters, except to say that the Ninth Circuit's treatment of these matters, contained at pages 1020 through 1022, is correct.

4.

CONCLUSION

Litigation typically involves at least one happy and one unhappy party. This Court has historically refused to function as a second level appellate court, realizing its limited resources and the imperative need to focus those resources on cases involving important questions of law of great general interest. This is not such a case and the petition should be denied.

DATED: July 3, 1986

Respectfully submitted,
BARGER & WOLEN
By KENT KELLER
STEVEN H. WEINSTEIN
Attorneys for Respondent
Teachers Insurance and
Annuity Association and
College Retirement
Equities Fund

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 3, 1986, I served the within Response to Petition for Writ of Certiorari in re: "Dr. Charles Milo Connick vs. Teachers Insurance and Annuity Association of America and College Retirement Equities Fund" in the United States Supreme Court, October Term 1986, No. 85-2012;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

J. Thomas Gilbride
7624 S. Painter Avenue
Second Floor
Whittier, California 90602

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 3, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA